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ABSTRACT

The purpose of this study was to determine the current legal status of U.S. postsecondary education by examining the legal doctrine of academic abstention, a theory by which U.S. jurists have hitherto avoided excessive legal interference with the academic affairs of colleges and universities. Since World War II, however, changes in the student and employee demographics of colleges and universities, changes in the size and governance of higher education institutions, and an increase in judicial activism have brought judicial scrutiny and participation to areas which had long been the exclusive responsibility of academic officials. The theoretical basis and evolution of the doctrine of academic abstention are examined with emphasis on the theory of special expertise, the school's role of "in loco parentis," the discretionary authority of public officials, state-federal comity, the law of private associations, and contract law. An analysis of recent court decisions finds that the judiciary is deferring less to the discretionary authority of the school in such areas as discrimination though it continues to defer to the special expertise of academicians in purely academic areas of decision making. It is noted that the primary responsibility for maintaining academic freedom and autonomy rests with legislators and institutional officials. Fifty-two footnotes provide the study's documentation. (JB)

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EVOLUTION OF THE DOCTRINE OF ACADEMIC ABSTENTION IN AMERICAN JURISPRUDENCE

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Introduction

Higher education has enjoyed relative independence from social, governmental, and religious influences since the twelfth century. This autonomy has been regarded as necessary in order to preserve the quality of the educational process and to permit the unfettered advancement of knowledge.

American higher education has enjoyed the same traditional freedom as did its European counterparts. Since World War II, however, American colleges and universities have undergone vast changes because of profound demographic changes in student and employee populations. The resulting diversity has produced conflict which often requires judicial resolution. Additionally, substantive changes in the size and governance of higher education institutions, combined with increased judicial activism, served as catalysts for judicial intervention. Decisionmaking areas which had long been the exclusive responsibility of academic officials soon accommodated judicial scrutiny and participation.

Academic abstention has been described as a theory by which American jurists avoided excessive interference with the academic affairs of colleges and universities.[1] This study sought to determine the current legal status of American postsecondary education in terms of academic autonomy and freedom by examining the evolution of the doctrine of academic abstention in American jurisprudence. It was conducted to broaden

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[1]H.T. EDWARDS & V.D. NORDIN, HIGHER EDUCATION AND THE LAW (1979) [hereinafter EDWARDS & NORDIN]; H.T. EDWARDS, HIGHER EDUCATION AND THE UNHOLY CRUSADE AGAINST GOVERNMENTAL REGULATION 1 (1980) [hereinafter EDWARDS]; J.C. ROGERS, THE EVOLUTION OF A CONTRACTUAL RIGHT FOR THE AMERICAN COLLEGE STUDENT 189 (1986) (Ph.D. diss., Florida State University) [hereinafter ROGERS]; *see also* J.O. RICHARDSON, JUDICIAL OPINIONS GOVERNING PROCEDURAL DUE PROCESS IN DISCIPLINARY PROCEEDINGS INVOLVING SUSPENSION AND EXPULSION OF COLLEGE STUDENTS 5 (1983) (Ph.D. diss., University of Minnesota).

the understanding of an important legal doctrine which helps balance the relationship between American higher education institutions and external social and political forces. "Any legal theory relating to institutions of higher education must take into account the doctrine of academic abstention."[2]

Evolution of Academic Abstention

"Academic abstention" is a label which appeared late in the evolution of the judicial behavior which it describes. The term "academic abstention" is often entangled with other topics such as academic freedom, faculty or student rights, and institutional autonomy. In its most general meaning, academic abstention refers to the judiciary's deferential attitude toward higher education.[3] This deference reflects a tradition in which jurists have perceived colleges and universities as special places. So special, in fact, that if the judiciary interfered with their internal operation, a delicate balance would be disturbed and the institutions might suffer.

In addition to attaching a special value to institutions of higher learning, the courts also viewed faculty members and administrators as possessing unique virtues and abilities. This perception of the special expertise of educators is perhaps the single most important factor with which to characterize the term "academic abstention."

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[2]Nordin, *The Contract to Educate: Toward a More Workable Theory of the Student-University Relationship*, 8 J. COLL. & UNIV. L. 141, 146 (1980-82).

[3]EDWARDS & NORDIN, *supra* note 1; P.A. HOLLANDER, LEGAL HANDBOOK FOR EDUCATORS (1978); W.A. KAPLIN, THE LAW OF HIGHER EDUCATION (1978); Kaplin, *Law on the Campus 1960-1985: Years of Growth and Challenge*, 12 J. COLL. & UNIV. L. 269 (1985); Nordin, *supra* note 2; O'Neil, *God and Government at Yale: The Limits of Federal Regulation of Higher Education*, 44 CIN. L. REV. 525 (1975); Wright, *Faculty and the Law Explosion: Assessing the Impact—a Twenty-Five Year Perspective (1960-1985) for College and University Lawyers*, 12 J. COLL. & UNIV. L. 363 (1985).

"Academic abstention" does not appear in any reported court case involving judicial abstention in higher education affairs between 1800 and 1989.[4] The label appears to be the creation of Harry T. Edwards and Virginia D. Nordin since it first surfaced in the literature in their 1979 book.[5] Since then, it has been used by other scholars to describe the judiciary's general deferential attitude toward academic matters.[6]

Often used in the secondary literature to refer to a broad range of judicial deference toward educational decisionmaking, the doctrine is quite narrow in its purest academic context. Jurists have used synonymous expressions for this attitude. Such phrases include "rule of judicial nonintervention in scholastic affairs,"[7] "traditional rule of nonintervention in academic matters,"[8] "doctrine of judicial abstention,"[9] "policy of judicial restraint in interfering with the administrative discretion exercised by an

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[4]Because of the label's absence in reported court decisions, one could conclude that in the strictest legal sense, there is no "doctrine of academic abstention." The term is useful, however, because more than any other appellation it conveys the nature of the body of law in which courts defer to "pure" academic decisionmaking.

[5]EDWARDS & NORDIN, *supra* note 1. *See also* EDWARDS, *supra* note 1.

[6]*E.g.*, HARTWIG-EICHELMAN, EDUCATIONAL CONTRACT THEORY AND GOVERNANCE: THE EROSION OF ACADEMIC ABSTENTION (1985) (Ph.D. diss., University of Wisconsin-Madison); ROGERS, *supra* note 1; Zirkel, *Diploma by Estoppel*, NOLPE NOTES, Dec. 1990, at 2.

[7]Connelly v. University of Vt. & St. Agric. College, 244 F. Supp. 156 (D. Vt. 1965); Mustell v. Rose, 282 Ala. 358, 211 So.2d 489 (1968).

[8]Mahavongsanan v. Hall, 529 F.2d 448 (5th Cir. 1976); Wong v. Regents of Univ. of Cal., 15 Cal. App.3d 826, 93 Cal. Rptr. 502 (Cal. Ct. App. 1971); Jansen v. Emory Univ., 177 Ga. App. 30, 338 S.E.2d 500 (Ga. Ct. App. 1985); State *ex rel.* Bartlett v. Pantzer, 158 Mont. 126, 489 P.2d 375 (1971) (per curiam).

[9]Keys v. Sawyer, 353 F. Supp. 936 (S.D. Tex. 1973).

educational institution,"[10] and "anti-interventionist policy."[11] Despite their syntactical variety, these statements denote a traditional judicial deference to the special knowledge and expertise of academic officials. These variations also emphasize the common-law or judge-made quality of the doctrine through the use of terms such as "rule," "policy," and "doctrine." An analysis of court decisions tracing the evolution of the doctrine of academic abstention has led to the conclusion that its evolution is directly connected to the theory of special expertise more than any other abstention rationale.

The Theory of Special Expertise

The doctrine of academic abstention rests upon the foundation of the special expertise of the academician. The uncommon knowledge and experience of college and university faculty or administrators places them in a position which jurists feel ill-equipped to assume. The earliest court cases in which judges articulated reasons for deferring to the special expertise of postsecondary level academic authorities occurred near the end of the nineteenth century.[12] Those cases addressed the issue of whether students had earned degrees in the medical field. Judges acknowledged their lack of expertise in the field of medical science and refused to substitute their knowledge for that of the faculty.

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[10]McIntosh v. Borough of Manhattan Community College, 55 N.Y.2d 913, 433 N.E.2d 1274, 449 N.Y.S.2d 26 (N.Y. 1982); *In re* Levy, 88 A.D.2d 915, 450 N.Y.S.2d 248 (N.Y. App. Div. 1980).

[11]Smith v. University of N.C., 632 F.2d 316 (4th Cir. 1980); Powell v. Syracuse Univ., 580 F.2d 1150 (2nd Cir. 1978), *cert. denied*, 439 U.S. 984 (1978).

[12]*E.g.*, Jones v. New York Homeopathic Med. College & Hosp., 20 N.Y.S. 379 (N.Y. City Super. Ct. 1892); State *ex rel.* Niles v. Orange Training Sch. for Nurses, 63 N.J.L. 528, 42 A. 846 (1899).

These cases also shared a common remedy in which the plaintiff sought a writ of mandamus to compel the award of a degree.

The nature of the remedy shaped the courts' approach; in these early academic qualification cases, the courts characterized the exercise of discretion in terms of a quasi-judicial function. They perceived academic authorities as making similar subjective decisions requiring special knowledge or experience. For example, when faculty members act in their official capacity to determine if a student had earned a degree, they employ investigatory and reasoning techniques analogous to those used by the judiciary. Just as the courts would not interfere in the decisionmaking process of an administrative agency or some other court, they refused to interfere with the academic decisionmaking process for similar reasons.[13]

Courts did intervene in order to secure the proper exercise of this quasi-judicial authority. Within "settled legal principles,"[14] they could review the exercise of authority by other courts, administrative agencies, and education officials. The remedy of mandamus[15] has been a means by which the judiciary could enforce public and private rights. But judges awarded the writ cautiously if the duty to be performed involved the exercise of discretion. Generally, courts could only compel authorities with such discretion to perform an absolute and imperative duty requiring no discretion or judgment.[16]

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[13]*Jones*, 20 N.Y.S. at 380.

[14]*Niles*, 42 A. at 847.

[15]*See generally* Harker, *The Use of Mandamus to Compel Educational Institutions to Confer Degrees*, 20 YALE LAW J. 341 (1911) [hereinafter Harker].

[16]Such a nondiscretionary duty is called a ministerial duty.

In contrast, officials with legally conferred discretion had the power to act according to their own judgment. Academicians possessed such authority.[17] As long as they exercised their authority within legal limits, mandamus could not be used to dictate how they employed their judgment. However, when evidence revealed that school officials acted arbitrarily, capriciously, in bad faith, from selfish motives or a willingness to evade a duty, jurists did not hesitate to review and regulate their actions.[18]

Thus, from the earliest court cases pertaining to public and private higher education, the judiciary has focused on the procedural aspects of academic decisionmaking. The nature of mandamus dictated a judicial deference to the honest exercise of discretionary judgment. This deference, combined with an acknowledged lack of expertise in specialized academic fields, constrained judges from substituting their judgment for that of the academicians.

This procedural focus continued into the twentieth century and expanded to include academic issues related not only to student qualifications for degrees but to other student academic qualifications,[19] faculty qualifications,[20] and related academic issues.[21] Even

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[17]The concept of special expertise in higher education, upon tracing cited precedents back to 1827, appears to have evolved from the law of elementary and secondary level schools since much of the earliest litigation concerning educational issues occurred at those levels. *See generally* Fuller v. Trustees of Sch. in Plainfield, 6 Conn. 532 (1827); Thompson v. Beaver, 63 Ill. 353 (1872); Grove v. School Inspectors of Peoria, 20 Ill. 526 (1858); Burdick v. Babcock, 31 Iowa 562 (1871). *See also* Barnard v. Inhabitants of Shelburne, 216 Mass. 19, 102 N.E. 1095 (1913) (secondary school case which influenced Supreme Court in *Horowitz*).

[18]*E.g.,* Brown v. Board of Educ. of City of Cleveland, 6 Ohio N.P. 411 (Ct. of C.P., Cuyahoga Co. 1899); People *ex rel.* Barnet v. College of Physicians & Surgeons, 7 How. Pr. 290 (N.Y. Sup. Ct. 1852).

[19]*See generally* T. LEAS, EVOLUTION OF THE DOCTRINE OF ACADEMIC ABSTENTION IN AMERICAN JURISPRUDENCE 183 (1989) (Ph.D. diss., Florida State University).

in cases involving individual constitutional rights[22] or civil rights legislation,[23] the courts' focus remained on the procedural aspects of educational decisions.[24]

The doctrine of academic abstention is best defined in terms of the American judiciary's deference toward the substantive elements of academe. That is, judges will not encroach on those academic areas which require special expertise or experience, such as the evaluation of students for admission or a degree, the evaluation of an institution for accreditation, and the evaluation of faculty credentials for hiring, promotion, and tenure. While they will attempt to learn if academicians properly considered the merits of a student's work or an applicant's credentials, judges will not substitute their judgment vis-a-vis the proper weight to be given to that work or those credentials.

Other Theories for Judicial Abstention

An analysis of court decisions related to the different theories courts have used to justify abstention supports the conclusion that in addition to the theory of special expertise, judges have justified judicial abstention in educational affairs according to a variety of other theories. Included among these justifications are the doctrines of in loco parentis, discretionary authority, and state-federal comity. Interpretations based on the law of private associations and contract law also have supported judicial abstention in

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[20]*See generally Id.* at 198.

[21]*See generally Id.* at 173, 178, 208.

[22]*E.g.,* Kunda v. Muhlenberg College, 621 F.2d 532 (3rd Cir. 1980).

[23]*E.g.,* Southeastern Community College v. Davis, 442 U.S. 397 (1979).

[24]For the current definitive judicial word on this subject, see Regents of Univ. of Mich. v. Ewing, 474 U.S. 214 (1985); Board of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978).

some educational matters. These theories, however, have little to do with academic abstention in its purest context. They refer to specific legal areas which lie outside the academic field but which have tangential application within higher education.

In loco parentis

The doctrine of in loco parentis in American jurisprudence was a product of English law. The doctrine arose within the context of family law and reflected earlier attitudes in which children were characterized in terms of property. The authority of parents over their children was virtually absolute. Moreover, this authority could be transferred to the schoolmaster at the elementary and secondary education levels.

As American jurists attempted to define their relationship with institutions of higher learning, they adopted the doctrine of in loco parentis to characterize the relationship between student and faculty. Expressing a concern for the maintenance of order on the college campus, jurists extended parental authority to school officials.[25] Under this doctrine, school authorities controlled the lives of their students with little chance of judicial interference.

As early as 1887, however, jurists began to doubt the validity of the in-loco-parentis doctrine.[26] Expressing concerns regarding the fairness with which officials treated students, judges realized that many college students had reached the age of majority and found the doctrine an inadequate justification for treating adults like children.

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[25]State *ex rel.* Pratt v. Wheaton College, 40 Ill. 186 (1866); Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913); Stetson Univ. v. Hunt, 88 Fla. 510, 102 So. 637 (1924).

[26]Commonwealth *ex rel.* Hill v. McCauley, 3 Pa. C. 77 (Cumberland Co. C.P. 1887).

Nearly seventy-five years passed before the doctrine was permanently rejected at the postsecondary level.[27]

The judicial perspective eventually moved from a nearly exclusive concern for the maintenance of order to a concern for justice. During the 1960s, an epidemic of campus disorders provoked clashes between university officials and students which resulted in extensive litigation. The increasing size and public nature of colleges and universities also promoted judicial activity in this area. The courts began to consider the rights of students respective to the authority of college officials in much the same way they were already pondering the rights of minorities. Following the Warren Court's lead, jurists were more active and willing to participate in judicially familiar areas of educational decisionmaking.

The nature of student disciplinary cases was similar to that of employment dismissals and criminal prosecutions. Judges confidently and carefully considered the substantive and procedural rights of college and university students before outlining the procedures by which school officials would have to abide.[28] In loco parentis was dead, and the courts were participating more actively in the area of student discipline.

The rejection of the doctrine of in loco parentis reflected the judiciary's increasing concern with the establishment and maintenance of a just society. As influences outside the academy demanded greater social justice via civil rights reforms, the courts insisted upon similar reforms for students.

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[27]Dixon v. Alabama St. Bd. of Educ., 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 386 U.S. 930 (1961).

[28]*See generally* General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Insts. of Higher Educ., 45 F.R.D. 133 (W.D. Mo. 1968).

Discretionary Authority

The doctrine of academic abstention is partially derived from the traditional judicial respect for the discretionary authority of public officials. Secondary and postsecondary education cases indicate that judicial deference to the discretionary authority of college officials frequently was an outgrowth of the deference given to the statutory authority of public officials. When jurists relied on the doctrine of discretio ary authority to abstain from encroaching on academe, they presumed that educational authorities at public and private institutions performed their duties legally and in good faith.[29] Since mandamus was the common remedy sought by plaintiffs during the early development of the doctrine of academic abstention, the deferential attitude of the courts toward academicians was a product of the legal limits governing the application of the writ.[30]

This deference was also related to the traditional autonomy of private educational institutions. Private institutions have enjoyed greater autonomy because of their nongovernmental nature. When officials at private institutions act, they do so without the authority of government fiat. Courts have perhaps felt protective toward private institutions since 1819, when the Supreme Court shielded a private college from political meddling by state officials.[31]

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[29]*See* Moore v. Lory, 31 P.2d 1112 (Colo. 1934); Smith v. District Township of Knox, 42 Iowa 522 (1876) (all acts of public officers are to be regarded as prima facie correct).

[30]These limits are almost as old as the doctrine itself, which can be traced back to fifteenth-century England. Harker, *supra* note 15, at 341.

[31]Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

Distinctive from special expertise, the doctrine of discretionary authority was generally applied in the areas of student discipline[32] and faculty employment issues.[33] The two approaches were distinguished according to the focus of the court. In special expertise abstentions, courts generally looked at the esoteric academic aspects of the case to support abstention. In discretionary authority cases, courts looked to the statutory or implicit authority of officials. Also, in special expertise cases, judges generally considered the potential adverse effects on the academic community; in discretionary authority cases, they focused on adverse effects beyond academe. Regardless of the doctrine applied, the criteria for judicial abstention required that college and university officials not act in bad faith, arbitrarily, capriciously, or be guilty of illegal discrimination or constitutional violations.

Enactment of civil rights legislation and judicial concerns regarding the individual constitutional rights of students and employees influenced the judiciary's attitude toward the discretion of educational leaders. As public institutions grew in size and bureaucratic nature, judges appeared less inclined to defer to the discretionary authority of educators. The relative imbalance of power between institution and student or employee made courts

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[32]The doctrine was one alternative toward which the courts turned when they rejected in loco parentis. *See* Anthony v. Syracuse Univ., 224 A.D. 487, 231 N.Y.S. 435 (N.Y. App. Div. 1928) (autonomy of private institutions); People *ex rel.* O'Sullivan v. New York Law Sch., 22 N.Y.S. 663 (N.Y. Sup. Ct. 1893) (student dismissal a reasonable exercise of discretionary authority).

[33]People *ex rel.* Kelsey v. New York Postgraduate Med. Sch. & Hosp., 22 A.D. 244, 51 N.Y.S. 420 (N.Y. App. Div. 1898).

sensitive to possible abuse.[34] The increased value of a college education in terms of a property right also precipitated a judicial willingness to review the decisionmaking of educators.[35]

The judiciary's perspective was also influenced by civil rights legislation. If the plaintiff could establish a prima facie case of unlawful discrimination or a constitutional violation, the court was virtually compelled to peruse institutional practices.[36] Only when there was no evidence of impermissible violations or other wrongdoing, courts continued to defer to the discretionary authority of educators to maintain order on their campuses.

State-Federal Comity

From 1800-1959, the federal courts were relatively inactive participants in higher education litigation. The lack of activity reflected the federal jurists' perception that educational matters were primarily a state responsibility. This responsibility is ensured by the tenth amendment of the Constitution which reserves to the states or people those powers not specifically delegated to the federal government.[37]

Cases concerning judicial deference for reasons of comity are negligibly relevant to the doctrine of academic abstention. A jurisdictional concept, comity is tangentially applicable to the educational setting. When federal courts abstained from entering an educational controversy for reasons of comity, they were deferring to the statutory or

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[34]Courts wanted to avoid abuses similar to those which occurred at private institutions. *See, e.g., Stetson*, 88 Fla. 510, 102 So. 637; Miller v. Dailey, 136 Cal. 212, 68 P. 1029 (1902).

[35]*E.g., Dixon*, 294 F.2d 150.

[36]*See, e.g., In re* Dinnan, 661 F.2d 426 (5th Cir. 1981).

[37]U.S. CONST. amend. X.

constitutional authority of state government officials. Such cases are useful for understanding the limited role of the federal courts before 1960, however.[38]

Law of Private Associations

Another abstention doctrine with limited relevance is the law of private associations as it relates to judicial review of accreditation activities. Accreditation is a voluntary, nongovernmental activity designed to promote the self-regulation and evaluation of colleges and universities. Accreditation depends upon a peer-review process in which colleagues from other institutions make on-site visits and evaluate the educational quality of an institution according to defined criteria. Lacking the authority of government bodies, accreditation associations rely upon persuasion and peer influence to bring about change.

The value of accreditation has increased during the last two decades because the federal government and many state governments have tied institutional or student eligibility for financial aid to accredited status. As a result, there have been court cases in which institutions challenged adverse decisions made by accrediting agencies. Because accreditation incorporates elements of pure academic decisionmaking, the courts generally relied on a combination of the theory of special expertise and the law of private associations when they abstained.[39]

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[38]*E.g.*, Waugh v. Board of Trustees of Univ. of Miss., 237 U.S. 589 (1915); Steier v. New York St. Educ. Comm'r, 271 F.2d 13 (2nd Cir. 1959).

[39]*E.g.*, North Dakota v. North Central Ass'n of Colleges & Schools, 23 F. Supp. 694 (E.D. Ill. 1938), *aff'd*, 99 F.2d 697 (7th Cir. 1938); Parsons College v. North Central Ass'n of Colleges & Schools, 271 F. Supp. 65 (N.D. Ill. 1967). *Cf.* Marjorie Webster Jr. College v. Middle States Ass'n, 432 F.2d 650 (D.C. Cir. 1970) (accrediting agency challenged as violating the Sherman Antitrust Act and the fifth amendment).

The law of private associations arises out of the common law governing such organizations as churches, lodges, civic clubs, and other voluntary associations. Courts have generally abstained from any interference in the affairs of such organizations unless they violate their own constitutions, bylaws, rules, or regulations. In the educational setting, courts have similarly deferred to the decisions of accrediting agencies as long as there was no state action involved, as long as the agency's internal rules were followed, and because of the special expertise involved in the peer-review process. In terms of academic abstention, the law of private associations has little direct meaning. Its application for judicial abstention simply reflects the private, not academic, nature of the accrediting organization.

Institutional challenges to adverse accreditation decisions serve to increase judicial involvement in the substantive affairs of academe. Officials at postsecondary educational institutions should heed the lessons learned from the student conflicts of the 1960s and 1970s. The eagerness with which institutional officials sought judicial support during that time led to a judiciary willing to enter other areas of academe.[40]

Contract Law

Like the theories of comity and the law of private associations, contract law has been used by courts to abstain from interfering with the decisions of academicians. Normally, contract issues have involved private institutions and employment controversies. In earlier cases involving the remedy of mandamus, courts abstained because the writ was

[40]O'Neil, *Judicial Overkill*, 2 CHANGE 39 (Sept.-Oct. 1970).

not an appropriate way of settling a contract dispute. Courts simply refused to hear such cases and suggested that the plaintiff seek a remedy for specific performance.[41]

Like the doctrine of discretionary authority, contract law was an attractive alternative to in loco parentis. Courts felt imminently qualified to review contract disputes and did not hesitate to intervene.[42] So long as they focused on the contractual elements of the relationship between student and institution, the courts avoided disrupting substantive academic activities.

Judicial abstention predicated on contractual interpretations, like that based on theories of comity and private association law, has little to do with academic abstention. Contract law is simply another branch of the law which has applicability in the educational milieu. These theories enabled judges to avoid intruding in the substantive activities of academic decisionmaking. By applying interpretations appropriate to the factual aspects of each controversy and focusing on procedural and nonacademic considerations, the courts have been able to balance the elements of order and justice without substituting their judgment for that of academicians.

Courts are not unwilling to resolve conflicts arising in the educational environment. Within the limits of applicable law, they will review the procedural aspects of a controversy without usurping the special expertise of academicians. The judiciary's major concern vis-a-vis academic decisionmaking is the element of fairness. Courts refused to

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[41]*E.g.*, State *ex rel.* Burg v. Milwaukee Medical College, 128 Wis. 7, 106 N.W. 116 (1906).

[42]*E.g.*, Baltimore Univ. of Baltimore City v. Colton, 98 Md. 623, 57 A. 14 (1904).

intervene as long as academicians conducted their affairs in good faith, without arbitrary, capricious, or unlawful motivations.

Implications

An analysis of court decisions identifying the legal implications of academic abstention in higher education, relative to academic, student rights, and employment issues, supports the conclusion that social changes and substantive changes in the size and governance of institutions of higher education have produced a bifurcated perspective in which the judiciary is less inclined to defer to the discretionary authority of school officials. On the other hand, the courts continue to defer to the special expertise of academicians in purely academic areas of decisionmaking.

Social Changes and the Law

If a legal system reflects the society which it serves, then the period 1800-1899 was a time in which the judiciary reflected American society's concern with the establishment and maintenance of an orderly society. This concern for order was a response to the kind of world in which nineteenth-century Americans lived. It was a time when pioneers and settlers tamed a continent, issues of regional economics and slavery were debated, and a civil war was fought.

The new century brought threats of socialism and anarchism. Industrialism forced ever-increasing change. Two world wars and a depression created untold suffering. After World War II, Communism replaced the Nazi threat. State and federal governments perused the loyalties of their citizens during a period when neighbor did not trust neighbor. The atomic era began with a bang, and people became even more uneasy.

The prosperity of the 1950s, in contrast, enabled Americans to achieve a standard of living and stability never before seen in history and to be less concerned about political, military, and economic threats. Americans began to examine the quality of life at all levels of society. The 1960s saw the civil rights movement turning attention to the issue of establishing and maintaining a more just society.

Congress, state legislators, and activist courts followed society's lead. Various laws were enacted in an effort to eliminate the adverse effects of discrimination in educational and employment opportunities. Armed with a clear mandate from the legislative branch to protect individual constitutional rights, the judiciary began to intervene in internal areas of academia which previously had been controlled exclusively by academicians.

Institutional Changes and the Law

Paralleling these social developments were equally significant changes in the size and governance of American institutions of higher education. Originally, higher education in this country was limited to a minority of people. Institutions were small and private. Usually affiliated with a religious denomination, they prepared new generations of clergy to meet the spiritual needs of a growing nation. Higher education was specialized, aristocratic, and maintained a controlled environment, but the structure was not permanent.

Changes in the structure of American higher education began early. The founding of the University of Georgia in 1785, heralded the advent of the land-grant university. A major step toward a more democratic higher education system, government-supported education provided opportunity to those who could not have otherwise pursued their

educational goals. The curriculum and clientele became increasingly diverse as students representing all segments of society entered the classroom. Higher education's greater public support and political role reflected the extent to which a college education was assuming more importance for Americans.

After World War II, there was a period of unprecedented expansion when the GI Bill[43] made a higher education available to millions of returning service personnel. A college education was increasingly accessible to more people and had become the most viable channel for economic and status mobility in American society.[44] Along with the growth in enrollment was a corresponding increase in the size of universities and colleges. The small private college of the mid-nineteenth century was no longer the prevalent institution. Major public universities, serving tens of thousands of students and employing thousands of faculty members, soon fulfilled the educational needs of most Americans. Further, government had become a powerful and generous ally of higher education. Science research brought in hundreds of millions of federal dollars; higher education became big business.[45]

As the relationship between institutions of higher education and state and federal government grew closer, colleges and universities were subject to greater public control. State budget experts, legislative committees, governors, and the courts became more involved in higher education affairs. The courts, when considering student and faculty

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[43]The Servicemen's Readjustment Act, ch. 268, 58 Stat. 284 (1944).

[44]Weinberg, *Social Change*, in FOUNDATIONS OF EDUCATION 91 (1971).

[45]Kerr, *Administration in an Era of Change and Conflict*, 54 EDUCATIONAL RECORD 38, 39 (1973).

dismissal cases, no longer viewed these institutions as relatively weak and vulnerable. Colleges and universities were now viewed as powerful extensions of government, against which individual constitutional rights must be protected. Recent cases[46] suggest that courts are less willing to defer to the discretionary authority of large, bureaucratic institutions. The tremendous power of such organizations and the potential for abuse has prompted a greater caution among jurists as they balance issues of order and justice.

The exercise of judicial abstention is a situational phenomenon. The application of any theory or doctrine of judicial abstention in higher education litigation depends upon the court's perspective, the facts of the case, and the relevant law. The notion that law exists to create a more orderly and a more just society is not a simple dichotomy with justice on one side and order on the other. American law serves both ideals simultaneously. The focus at any one point in history may be on one area more than the other, but the ultimate goal is to seek an acceptable balance between the two. This attempt to establish a balance of competing ideals explains why judges have changed their attitudes about the extent to which they should defer to academic officials. "The law is not merely a composition of cold type; it is a living organism which moulds itself to meet the needs of an ever changing civilization...."[47]

Although doctrines and theories supporting judicial abstention from higher education decisionmaking wax and wane, the application of the doctrine of academic abstention within the context of special expertise has remained constant at the highest judicial level. The United States Supreme Court continues to admonish lower courts which attempt to

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[46]*E.g.*, McConnell v. Howard Univ., 818 F.2d 58 (D.C. Cir. 1987).

[47]*In re* Fallon, 178 N.Y.S.2d 459, 463 (N.Y. App. Div. 1959).

substitute their judgment for that of academicians in substantive academic areas.[48] Judicial intervention into the procedural aspects of educational decisionmaking will persist, however. A body of statutory and common law designed to protect the individual constitutional rights of students and employees will continue to challenge education officials to conduct themselves with procedural precision. So long as college and university officials conduct their affairs without evidence of bad faith, arbitrary or capricious intent, impermissible discrimination, and abuse of authority, the judiciary will defer to the discretionary judgment and special expertise of academicians.

Judicial Concerns and Responsibilities

Jurists face ever-increasing case loads as legislatures enact laws which permit legal challenges to virtually any form of decisionmaking. In order to effectively deal with antidiscrimination cases, the judiciary can be expected to increase the use of expert testimony to determine if the actions of education officials were within the general usage and custom of the academic community. The record of earlier decisions suggests that such testimony will be of little value if applied to substantive issues such as the evaluation of student and faculty qualifications.[49] The increasingly complex and varied judicial methodologies for contending with employment discrimination claims will continue to produce trials on which large amounts of court time and institutional resources will be expended.[50]

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[48]*E.g., Ewing*, 474 U.S. 214; *Horowitz*, 435 U.S. 78.

[49]*E.g.*, State *ex rel.* Nelson v. Lincoln Medical College, 81 Neb. 533, 116 N.W. 294 (1908).

[50]Lieberman v. Gant, 630 F.2d 60, 62 (2nd Cir. 1980) (produced a transcript of nearly 10,000 pages and almost 400 exhibits over 52 days); Johnson v. University of Pittsburgh, 435 F. Supp. 1328 (W.D. Pa. 1977) (dismissing complaint alleging refusal to grant promotion and tenure was discriminatory after 74 days of trial, 12,085 pages of testimony, 73

There is little doubt that public and private higher education will be subjected to greater external pressures. Public institutions can expect to experience less autonomy as public demands for accountability motivate state officials to become more involved in their operation. A larger federal presence accompanying financial aid programming will continue to challenge the traditional autonomy of private institutions. Expanding civil rights legislation will presumably continue to exact a high cost on private institutions which insist on noncompliance.[51]

Confusion appears to exist concerning which areas of academe are closed to legal challenge. An unlikely judicial response is a definitive statement about judicial standards for academic issues similar to the *General Order*[52] for student disciplinary issues. The judicial branch was not formed to serve in an advisory role, and the nature of the legal process does not lend itself to definitive statements regarding evolving legal doctrines. Although a statement about substantive academic issues and litigation, analogous to the *General Order*, could save state and private institutions, litigants, and the courts much time and expense, the history of the judiciary suggests that such an approach is unique.

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witnesses and nearly 1000 exhibits).

[51]*E.g.*, Grove City College v. Bell, 465 U.S. 555 (1984) (private college required to comply with Title IX's prohibition of sex discrimination as a condition for continued eligibility to participate in federal financial assistance programs); Bob Jones University v. United States, 461 U.S. 574 (1983) (private, religious university's regulation prohibiting interracial dating resulted in loss of tax-exempt status).

[52]The Federal District Court for the Western District of Missouri met en banc and issued a General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 F.R.D. 133 (W.D. Mo. 1968). The Order included specific judicial guidelines for officials at public institutions of higher education handling student discipline cases. The Order also provided similar guidance for other jurists hearing such cases.

One can expect that the courts will continue to play an important role in preserving academic freedom and autonomy on a case-by-case basis. By thoughtfully articulating those substantive academic areas which lie outside of judicial inquiry, jurists can provide guidance to legislators, attorneys, and institutional officials. The primary responsibility for securing and maintaining academic freedom and institutional autonomy belongs to institutional officials and legislators. Institutional officials must treat students and employees fairly, in compliance with statutory and common law. Legislators should acknowledge the special qualities of colleges and universities and avoid further erosion of their autonomy when drafting and adopting new laws. Working together, the two groups can protect the special interests of academe as well as those of society.